Supreme Court, U.S.
FILED
AUG 23 1994
OFFICE OF THE CLERK

(3)

No- 93-1830

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DONALD G. SPENCER

Petitioner,

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS

Respondent.

On Petition of Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

Bernhardt K. Wruble*
William R. Sherman
Verner, Liipfert, Bernhard, McPherson & Hand
901 - 15th Street, N.W.
Washington, D.C. 20005
(202)371-6097

Robert Nelson
Michael P. Horan
Paralyzed Veterans of America
801 - 18th Street, N.W.
Washington, D.C. 20006
(202) 416-7629

Attorneys for Petitioner

**Counsel of Record*

20 pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

Table of Authorities i

Statutes and Regulations ii

Argument 1

Conclusion 16

TABLE OF AUTHORITIES

CASES

American Dredging Co. v. Miller, 144 S. Ct. 981 (1994) 12

Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries, 62 U.S.L.W. 4543 (1994) 12

King v. St. Vincent's Hospital, 112 S. Ct. 570 (1991) (to be reported at 502 U.S. 215) . . . 14

Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994) . . 2,8,10,15

Rivers v. Roadway Express, Inc., 114 S. Ct. 1510 (1994) 7,10

United States Dep't of Energy v. Ohio, 112 S. Ct. 1627 (1992) 13

United States v. Nordic Village, Inc., 112 S. Ct. 1011 (1992) 13

Walters v. National Association of Radiation Survivors, 473 U.S. 305 (1985) 3,13

STATUTES AND REGULATIONS

38 U.S.C. § 5108 (Supp. IV 1992) . . . 3

38 U.S.C. § 5110(g)
(Supp. IV 1992) 3,5,7,12

38 U.S.C. § 7104(b) (Supp. IV 1992) . . 5

38 U.S.C. § 5107 (Supp. IV 1992) . . 11

38 C.F.R. § 3.102 (1988) 11

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1994

Donald G. Spencer,

Petitioner,

v.

Jesse Brown

Secretary of Veteran Affairs,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

ARGUMENT

---

1. Respondent disputes neither the importance of this case -- in that the decision below will adversely affect the

rights of primarily older veterans with disabilities (Pet. 28) -- nor that the court below failed to conduct the type of analysis prescribed by Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994). Respondent instead maintains that the decision below is correct, a view that is unfounded and would not, in any event, detract from the appropriateness of review by the Court of the important and unresolved issues presented by this case.

2. The parties appear to agree that the United States has, by statute, indicated its desire to provide benefits to disabled veterans of its armed services, and that the VA[1/] benefits system is designed to operate with "no formal res judicata

---

1/ Abbreviations correspond with those used in the Petition.

effect." See Walters v. National Association of Radiation Survivors, 473 U.S. 305, 311 (1985). Thus, a veteran may re-present his claim if there are either (1) new relevant facts, 38 U.S.C. § 5108 (Supp. IV 1992), or (2) new relevant laws, 38 U.S.C. § 5110(g) (Supp. IV 1992) (see Pet. 33-34).

As to the latter, Respondent concedes that the language of 38 U.S.C. § 5110(g) "presupposes" that compensation may be "awarded or increased pursuant to any [new] Act or administrative issue" (Resp't Br. 6). But Respondent's assertion that the statutory language "suggests" that it is limited to only "substantive" changes in the law is meritless (Resp't Br. 6).

Had the statute been amended to change only substantive elements -- for example, to provide that evidence of

fatigue and numbness should be accepted as dating the incipience of MS -- Respondent would concede that a veteran would be afforded de novo consideration. Any award resulting therefrom would be "pursuant to" the new act.

Here, the statute has in fact been amended to specify that, inter alia, a veteran is entitled to a decisional process that requires that his medical evidence be directly addressed, and that if rejected, such rejection be supported by countervailing evidence of record, and that a reasoned explanation for the VA's determination be given. Any resulting award would unquestionably be "pursuant to" this new act. Thus, the phrase "pursuant to," contrary to Respondent's argument (Resp't Br. 6), does not inherently "suggest" any resolution of the

point at issue. Rather, reliance on some other ground of decision is required.

3. Equally invalid is Respondent's claim that its interpretation "harmonizes" Section 5110(g) with 38 U.S.C. § 7104(b) (Resp't Br. 7). Respondent begs the question by asserting that consideration of a veteran's claim under the new VJRA rules would conflict with what Respondent tendentiously labels as the "general rule of finality" embodied in Section 7104(b) (addressing "new and material evidence"). It is just as easy to see the "harmony" of a scheme wherein Section 7104(b) addresses new <u>factual</u> matters, on the one hand, and Section 5110(g) addresses new <u>statutory</u> matters, on the other, without any conflict between their respective

operations. Thus there is simply no force in Respondent's contention.

4. By reduction then, what underlies the viewpoint of Respondent (and of the court below) is its assumption as to the appropriate retroactivity effect to be given procedural, as opposed to substantive, statutory changes. But its position is neither coherent nor consistent with Landgraf. If the statutory scheme involved here were not a benefits program (but were merely a waiver of immunity for the resolution of disputes) Respondent would surely argue, in this very case, that a even substantive change in the basis for compensation to veterans should not be deemed retroactive. However, because this case involves an important public benefits system (and

because Section 5110(g) implicitly provides a window for reconsideration of claims based on statutory changes), such a position would be undercut by virtually all of the considerations set forth in Landgraf[2/]. Respondent, of course,

---

2/ If this case involved solely a substantive change in a standard for the award of benefits, the veteran would nevertheless be confronted with (1) the presumption against retroactivity of substantive changes stated in Landgraf, as well as (2) the argument that a mere implication of retroactive application inhering in 38 U.S.C. § 5110(g) was insufficient to overcome such presumption. See Rivers v. Roadway Express, Inc., 114 S. Ct. 1510, 1516 (1994). While Respondent (and the VA) appear willing to concede that claims made pursuant to substantive statutory changes should be considered anew -- under the ideation that the claims are "new", "separate" and "distinct" from those originally presented (Resp't. Br. 7) -- this characterization merely begs the question by assuming that the "new" claims are in fact retroactively available to the veteran.

Properly analyzed under Landgraf, the reason why the veteran would be

(continued...)

concedes that reconsideration of the veteran's claim based on a substantive amendment of the benefits statute would be appropriate, but it does not provide an analytical framework for showing why this should be so (Resp't Br. 7). Accordingly, Respondent lacks a basis for considering the impact of a procedural change in the statute.

2/(...continued)
entitled to have such a claim considered anew is that allowing him to do so would (a) not burden private rights or undermine the public's expectations regarding proper behavior but rather would fulfill an important benefits objective; (b) not impair a right, not increase liability "for past conduct" or impose new duties with respect to completed conduct; (c) affect only "secondary" conduct; (d) not result in "manifest injustice"; and (e) not require any private person to pay for injuries caused. See Landgraf, 114 S. Ct. at 1502-1505.

5. Here, the law has been amended to adopt important procedural changes based on which a veteran's benefits will be determined. Analytically, all of the factors favoring retroactivity under Landgraf (see note 2 supra) remain applicable; but in addition, there is an even stronger basis for allowing a veteran to take advantage of the new rules, as there is no presumption here against retroactivity.

Respondent incorrectly addresses this issue by asserting that Landgraf requires a presumption that a statute should not be given retroactive effect absent "clear congressional intent" to the contrary (Resp't Br. 8). Such a presumption, however, attaches only to statutory provisions that prescribe new substantive requirements that affect the primary

conduct of persons, particularly private persons, so as not unfairly to undermine their reliance on pre-existing law. Landgraf, 114 S. Ct. at 1502. In contrast, statutes changing procedural rights are not "within the class of laws that are presumptively prospective," see Rivers, 114 S. Ct. at 1515, because, inter alia, such statutes affect only "secondary" conduct -- that is, conduct relating to how a claimant's rights are determined. Landgraf, 114 S. Ct. at 1502.

Respondent's error in this regard is evidenced in its contention that, "application of the VJRA to this case would 'increase a party's liability for past conduct,' Landgraf, 114 S. Ct. at 1505" (Resp't Br. 8 n.5; emphasis added). Benefits derive here from Petitioner's status as a member of the armed services

and the onset of his disability, not from the conduct of a party.

6. The VJRA also effected new substantive changes, which should be available to Petitioner. New Section 5107 provides that a veteran need only advance facts that would "justify a belief" that his claim is "well grounded"; and if the proof is ultimately in equipoise, the veteran must be given "the benefit of the doubt in resolving each" issue. 38 U.S.C. § 5107 (Supp. IV 1992).[3/] The Court has

---

3/ Before enactment of the VJRA, the rules governing burden of proof were set forth only in a VA regulation, 38 C.F.R. § 3.102 (1988). Under that regulation, if a "reasonable doubt" arose regarding "service origin," it was to be resolved in favor of the veteran. Unlike the current statutory provision, the rule was "not a means of reconciling actual conflict or a contradiction in the evidence." Id.

just recently held that, "the assignment of the burden of proof is a rule of substantive law." Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries, 62 U.S.L.W. 4543, 4544 (1994) (citing American Dredging Co. v. Miller, 144 S. Ct. 981 (1994). Thus, because Respondent has conceded that Section 5110(g) authorizes the retroactive application of substantive changes (Resp't Br. 6-7), and because the decision below erroneously characterized the VJRA as containing solely changes that were "unmistakably procedural," (see Pet. ii), the ruling below merits review, since it is inconsistent with several recent decisions of the Court.

7. Respondent also would improperly skew the analysis here by first characterizing the VJRA as a "waiver of sovereign immunity" [4/] and by then asserting that, as such, it is to be strictly construed "in favor of the government" (Resp't Br.

4/ It is only through wooden mislabeling that the VJRA can be characterized as a "waiver of sovereign immunity." The willingness of the United States to pay benefits to its disabled veterans -- that is, the basis for its exposure to liability -- is embodied in the statutory scheme that predates the VJRA. This scheme was administered through a decisional mechanism intended to operate with "a high degree of...solicitude for the claimant." Walters, 473 U.S. at 311. The VJRA was enacted solely to ensure that bureaucratically rendered decisions on a benefit claim were in fact fairly rendered decisions. The cases on which Respondent relies, United States Dep't of Energy v. Ohio, 112 S. Ct. 1627, 1633 (1992) and United States v. Nordic Village, Inc., 112 S. Ct. 1011, 1014-1015 (1992), in contrast, involve questions whether the United States has exposed itself to liability at all, through civil suits. Such cases do not bear on the considerations or procedures governing benefit programs.

7). Respondent ignores the contrary "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." King v. St. Vincent's Hospital, 112 S. Ct. 570, 574 n. 9 (1991) (to be reported at 502 U.S. 215). The Court has not previously reconciled these conflicting rules of construction, and this circumstance provides an additional basis for review. Petitioner wishes to make clear, however, that in its view the canon favoring the government has no logical place within a system explicitly designed to deliver benefits to disabled members of a particularly deserving class and such an interpretation is antithetical to the purpose of the veterans' benefit program.

8. Finally, as to those statutory changes that are purely procedural, their availability to a claimant should depend upon "common sense notions" of fairness in the context of the particular statutory and decisional system that is involved. See Landgraf, 114 S. Ct. at 1502, n. 29. Presented here is the demand by a veteran to receive, for the first time, a fair consideration of all his supporting evidence, and a reasoned response to his claim. His claim was previously denied in a procedural system that Congress has recognized as being adulterated in its operation. In this context, the need for the VA to provide an additional hearing for veterans who, like Petitioner, have the will, determination and conviction that they have been unfairly treated is a very modest price for affording them a

first opportunity to secure a procedurally fair determination of whether they deserve the benefits they claim.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Bernhardt K. Wruble*
William R. Sherman
Verner, Liipfert, Bernhard, McPherson and Hand
901 - 15th Street, N.W.
Washington, D.C. 20005-2301
(202) 371-6097

Robert L. Nelson
Michael P. Horan
Paralyzed Veterans of America
801 - 18th Street, N.W.
Washington, D.C. 20006
(202) 416-7629

Attorneys for Petitioner

* Counsel of Record